The McBurney Corporation *and* International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL–CIO. Cases 26–CA–17564, 26–CA–17979, and 26–CA–18017

February 29, 2008

ORDER DENYING MOTIONS FOR RECONSIDERATION

BY MEMBERS LIEBMAN AND SCHAUMBER

On September 29, 2007, the National Labor Relations Board, by a three-member panel, issued a Decision and Order in this proceeding, finding that the Respondent violated Section 8(a)(3) and (1) by discriminatorily refusing to hire certain union-affiliated applicants.[1] The Board ordered the Respondent to remedy its unlawful conduct by providing instatement and backpay to all of the discriminatees. The Board specified, however, that the awards of instatement and backpay to union salts[2] James Bragan and Dale (Skip) Branscum would be subject to the remedial limitations established in *Oil Capitol,* 349 NLRB No. 118 (2007). The Board also permitted the Respondent to show in compliance that additional discriminatees were salts and therefore subject to the same remedial limitations. *McBurney Corp.,* supra, 351 NLRB No. 49, slip op. at 3–4 (2007).[3]

On November 19 and December 18, 2007, respectively, the Charging Party and the General Counsel each filed a motion for reconsideration arguing that *Oil Capitol* should not be applied at the compliance stage of this case.

Having duly considered the matter, we find that neither the Charging Party's motion nor the General Counsel's motion presents "extraordinary circumstances" warranting reconsideration under Section 102.48(d)(1) of the Board's Rules and Regulations.

The Charging Party contends that the Board is precluded from applying *Oil Capitol* in compliance and that therefore the Board's decision should be reconsidered. The Charging Party notes that the Respondent did not file exceptions to the judge's recommended remedy insofar as he applied preexisting Board precedent, and that the Board's July 7, 2000 remand order was limited to consideration of *FES*. The Charging Party argues that the Board is therefore precluded from modifying the judge's recommended remedy. The Charging Party also argues that the Board's remedy is internally inconsistent insofar as it applies both *Oil Capitol* and *F. W. Woolworth Co.*, 90 NLRB 289 (1950). Further, the Charging Party argues that discriminatees Daniel Barney and Bruce Kemp were not salts and that therefore *Oil Capitol* should not apply to them. Finally, the Charging Party contends that retroactive application of *Oil Capitol* would cause "manifest injustice"; that *Oil Capitol* should not apply because the discriminatees (in general) were not "salts"; and that *Oil Capitol* was wrongly decided.

The General Counsel argues only that retroactive application of *Oil Capitol* would cause manifest injustice here.

We find that neither the Charging Party's nor the General Counsel's arguments establish "extraordinary circumstances" warranting reconsideration of the Board's decision. See NLRB Rules and Regulations, Section 102.48(d)(1). Accordingly, we shall deny their respective motions for reconsideration.[4]

[1] *McBurney Corp.,* 351 NLRB No. 49 (2007). Previously, on July 7, 2000, the Board remanded this case to the judge for further consideration under *FES*, 331 NLRB 9 (2000), supplemented 333 NLRB 66 (2001), enfd. 301 F.3d 83 (3d Cir. 2002). Member Schaumber did not participate in these proceedings.

Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Members Liebman and Schaumber constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Section 3(b) of the Act.

[2] Under Board law, salts are "individuals, paid or unpaid, who apply for work with a nonunion employer in furtherance of a salting campaign." *Oil Capitol Sheet Metal*, 349 NLRB No. 118, slip op. at 1 fn. 5 (2007). A salting campaign, in turn, is defined as a campaign in which a union sends its member(s) to an unorganized jobsite "to obtain employment and then organize the employees." *Tualatin Electric*, 312 NLRB 129, 130 fn. 3 (1993), enfd. 84 F.3d 1202 (9th Cir. 1996).

[3] In *Oil Capitol*, the Board held that "the traditional presumption that [a discriminatee's] backpay period should run from the date of discrimination until the respondent extends a valid offer of reinstatement" no longer applies where the discriminatee is a union salt. *Oil Capitol*, supra, 349 NLRB No. 118, slip op. at 2. The Board accordingly held that it would "now require the General Counsel, as part of his existing burden of proving a reasonable gross backpay amount due, to present affirmative evidence that the salt/discriminatee, if hired, would have worked for the employer for the backpay period claimed in the General Counsel's compliance specification." Id. The Board also held that an instatement order for a salt/discriminatee would be subject to defeasance if, at the compliance stage, the General Counsel failed to prove that the salt/discriminatee "would still be employed by the [r]espondent if he had not been the victim of discrimination." Id. at 7.

[4] Contrary to the Charging Party's argument, no extraordinary circumstances are presented by the absence of exceptions to the judge's remedy or by the scope of the Board's remand order; remedial issues are always before the Board. See *General Motors Corp.*, 347 NLRB No. 67, slip op. at 1 fn. 4 (2006). Nor is there inconsistency between *Oil Capitol* and *F.W. Woolworth,* 90 NLRB 289 (1950), warranting

In particular, we find no merit to the Charging Party's and General Counsel's argument that *Oil Capitol* should not be retroactively applied in this case. The Board in *Oil Capitol* stated that it would "apply this new evidentiary requirement in the present case and in all cases where the discriminatee is a union salt." *Oil Capitol*, supra, slip op. at 6. Subsequent to the issuance of *Oil Capitol*, the Board has routinely applied *Oil Capitol* in appropriate pending cases, all of which were instituted well before *Oil Capitol* was decided.[5] Moreover, *Oil Capitol* addressed matters presented in certain compliance proceedings. No compliance proceeding has yet been held in the present case. Thus, application of *Oil Capitol* does not require relitigation of any previously completed portion of this proceeding.

ORDER

IT IS ORDERED that the Charging Party's and the General Counsel's motions for reconsideration are denied.

Dated, Washington, D.C. February 29, 2008

Wilma B. Liebman, Member

Peter C. Schaumber, Member

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reconsideration. The former case concerns the General Counsel's burden to show that a salt-discriminatee would have worked throughout the backpay period alleged in the compliance specification, while the latter case holds that backpay must be calculated quarterly. Nor is reconsideration warranted by the Charging Party's premature argument that discriminatees Barney and Kemp are not salts; the Respondent must show in compliance that particular discriminatees (other than Bragan and Branscum) were "salts," as defined above.

Although Member Liebman dissented in *Oil Capitol*, and from the denial of a motion for reconsideration (unpublished dated November 15, 2007), she recognizes that the majority view in *Oil Capitol* is current Board law, and accordingly, for institutional reasons, she concurs in the denial of the motions here.

[5] See *Dial One Hoosier Heating & Air Conditioning Co.,* 351 NLRB No. 48, slip op. at 7 (2007); *Sproule Construction Co.*, 350 NLRB No. 65, slip op. at 3 (2007); *Shaw, Inc.*, 350 NLRB No. 37, slip op. at 1 fn. 4 (2007).